



**IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
TECHNOLOGY AND CONSTRUCTION COURT (QBD)**

HT-2018-000236

BETWEEN:

CENTRAL SURREY HEALTH LIMITED

Claimant

and

NHS SURREY DOWNS CLINICAL COMMISSIONING GROUP

Defendant

REPLY

1. Save where otherwise stated, references to paragraph numbers refer to paragraphs of the Defence. This Reply adopts the abbreviations, definitions and headings used in the Particulars of Claim.
2. Save as otherwise expressly stated below, the Claimant denies the allegations in the Defence and joins issue with the Defendant.

Factual background

3. Paragraphs 4 to 7 are admitted.
4. As to paragraph 9, it is averred that the Defendant (i) strongly urged the Claimant not to submit an independent tender for the Contract, but to tender as part of a consortium with local NHS bodies and (ii) intimated that an independent tender from the Claimant would not be successful. The Claimant will refer in this regard to conversations between Dr Clare Fuller, then Chair of



the Defendant, and Mr Stephen Cass, then Chief Executive Officer of the Claimant, in order around October 2017.

5. As to paragraph 10, it is admitted that the original Consortium Bid was submitted by EStH as lead contractor. It is averred that the Consortium Bid identified the Claimant as a “material subcontractor”.

6. As to the first sentence of paragraph 11, it is not admitted that the service delivery capability of the original Consortium Bid is satisfactorily replicated by the Reduced IDEEA Partnership. The relevance of this capability being “satisfactorily replicated” is, in any event, denied; the claim alleges that the contractual proposals put forward by the Reduced IDEEA Partnership must, necessarily, involve a material change/substantial modification to the original Consortium Bid; it is averred that “satisfactory replication” of service capability in the original Consortium Bid does not exclude the possibility of a material change to that Bid.

7. Save that the second and third sentences of paragraph 11(vii) are admitted, no admissions are made as to the matters at paragraphs 11(i)-(ix), which are outside the Claimant’s direct knowledge; the Defendant is put to strict proof thereof. Further:
 - a. As to paragraph 11(i), it is averred that no TUPE arrangements have yet been agreed between the Claimant and the Reduced IDEEA Partnership. It is further averred that the TUPE position of the Claimant staff currently delivering the adult community services in the Surrey Downs area is by no means clear and was a subject of substantial discussions between the Claimant and other members of the IDEEA Partnership prior to the Claimant exclusion from the IDEEA Partnership. In addition, there is a real risk that some of the Claimant staff eligible for TUPE transfer (who are co-owners of the Claimant under its social enterprise model) may decline to transfer to the employment of Reduced IDEEA Partnership or any of its members.



- b. As to paragraph 11(iv), it is denied, if alleged, that any of the members of the Reduced IDEEA Partnerships have a track record of delivering community services of the type required under the Contract and specifically delivery to the size, scale, scope and complexity. It is further averred that the last CQC review of EStH (in May 2018) gave it an overall rating of “Requires Improvement”; EStH also achieved a “Requires Improvement” rating in 2015 and 2016.
8. No admissions are made as to the “due diligence” process described at paragraphs 16(i), (ii), (iv) and (vi), which is outside the Claimant’s knowledge; the Defendant is put to strict proof thereof. Paragraphs 16(iii), (v) and (vii) are admitted, save that it is denied that the Defendant’s exercise of discretion not to reject or de-select the proposals of the Reduced IDEEA Partnership was valid and/or lawful insofar as it flowed from the matters described in paragraphs 16(i), (ii), (iv) or (vi) or at all; the Claimant refers to paragraph 9.c. below in this regard.

Defendant’s breach of duty

9. As to paragraph 20:
- a. Paragraph 20(a) is denied. It is averred that, under regulation 89 and 90 PCR15, the Defendant owed duties to “economic operators” defined in regulation 2(1) as *“any person or public entity or group of such persons and entities, including any temporary association of undertakings, which offers the execution of works or a work, the supply of products or the provision of services on the market”*. It is averred that the Claimant falls within that definition.
- b. As to paragraph 20(b), it is admitted that the original Contract Notice was published on 9 October 2017. It is denied that the original Contract Notice satisfies the requirements of regulation 75(1) PCR15 in circumstances

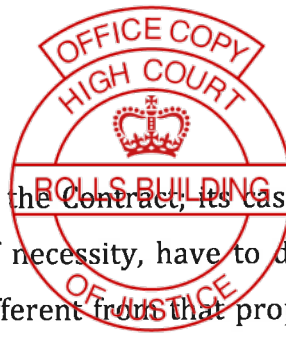


where the Contract awarded to the Reduced IDEEA Partnership is materially different from that proposed in the Consortium Bid.

- c. As to paragraphs 20(c) to (e):
- i. Save that it is denied that the “only change” between the original Consortium Bid and the contractual proposals of the Reduced IDEEA Partnership was the removal of the Claimant from the Partnership, no admissions are made as to the precise differences between the original Consortium Bid and the proposals of the Reduced IDEEA Partnership, the latter of which remain outside of the Claimant’s knowledge; the Defendant is put to strict proof thereof.
 - ii. The Defendant’s own evidence to date, in particular the First Witness Statement of Ms Donna Ann Derby of 17 September 2018 filed in support of the Defendant’s application to lift the restriction on entering into the Contract under regulation 95(1) PCR15, indicates that the proposals of the Reduced IDEEA Partnership involved, at least, some other changes from the original Consortium Bid; for example, changes to the TUPE arrangements required for the Claimant staff currently delivering adult community services and changes in the arrangements for management of patient records.
 - iii. In the premises, it is denied that the contractual proposals of the Reduced IDEEA Partnership “*did not involve any substantial modification or material change*”. The Claimant avers that the aforementioned changes to TUPE and patient record management arrangements (which the Defendant has admitted), in themselves, whether taken individually or together, constitute material changes/substantial modifications.



10. The description of the effect of regulation 76(3) PCR15 at paragraph 20(f) is admitted. As paragraph 20(g), the Claimant makes no plea of breach of regulation 76(3) PCR15.
11. As to paragraphs 20(h) and 20(j), it is admitted that neither paragraphs 2.6 or 2.19(e) of the ITT nor any of the provisions of PCR15 obliged the Defendant to reject a tender merely because of a change in a bidder's structure and/or change of the identity of control of the bidder, where that change did not amount to or involve a material change or substantial modification to the bidder's bid. It is denied, if alleged, that the Defendant had any discretion to accept a bid that was materially changed or substantially modified following the award decision without commencing a fresh procurement process.
12. Paragraphs 20(i) and 20(k) are denied. Paragraphs 8 and 9.c above are repeated.
13. Paragraph 20(l) is denied. It is averred that the Defendant was obliged by virtue of the principles of transparency and equal treatment enshrined in regulation 76(2) PCR15 to reject a tender from a Preferred Bidder that was materially changed (altered) or substantially modified following the award decision and/or failed to comply with the requirements of the ITT.
14. Paragraph 20(m) is denied. Paragraphs 8 and 9.c above are repeated.
15. Insofar as paragraph 20(n) is said to flow from the matters set out at paragraph 20(a) to (m), it is denied for the reasons given above. In particular, paragraphs 8 and 9.c above are repeated.
16. As to the first sentence of paragraph 21:
 - a. it is denied that the matters set out at paragraph 20(a) to (i) of the Particulars of Claim go only to "*capability and capacity of service delivery*". For the avoidance of doubt, the Claimant does not seek or need to show that the Reduced IDEEA Partnership is wholly incapable of



providing the services required under the Contract, its case is that the Reduced IDEEA Partnership would, of necessity, have to deliver those services in a way that is materially different from that proposed in the original Consortium Bid.

- b. It is denied that the proposals of the Reduced IDEEA Partnership “*materially replicated*” the original Consortium Bid; paragraph 9.c above is repeated.
17. Save that the second and third sentences of paragraph 21(f) are admitted, no admissions are made as to paragraphs 21(a) to (i). The proposals of the Reduced IDEEA Partnership are outside of the Claimant’s direct knowledge; the Defendant is put to strict proof thereof.

Relief including loss and damage

18. As to paragraph 24:
- a. Paragraph 24(a) is admitted.
 - b. Paragraph 24(b) is outside the Claimant’s direct knowledge and is not admitted; the Defendant is put to strict proof of the same.
 - c. Paragraph 24(c) is admitted.
 - d. As to paragraph 24(d):
 - i. it is admitted that, pursuant to regulation 75(2) PCR15, regulation 32 applies “by analogy” to the award of contracts for social and other specific services as described in Schedule 3 PCR15.
 - ii. It is averred that regulation 32 is to be interpreted strictly.



- iii. It is denied that regulation 32(2)(a) applies in circumstances where (1) the contracting authority initially receives one or more suitable tenders, but there is later a material change/substantial modification to the tender that has been accepted and/or (2) there is reason to believe that the contracting authority would receive multiple suitable tenders on a rerun of the relevant procurement.
- iv. It is, accordingly, denied that regulation 32(2)(a) would apply "by analogy" to permit the award of the Contract to the Reduced IDEEA Partnership where the latter's proposals involve a material change or substantial modification of the original Consortium Bid and the Claimant has expressed an interest in bidding (whether alone or as part of a different consortium) in any rerun of the Procurement.
- e. As to paragraph 24(e), for the reasons given above, it is denied that the Defendant has any right or discretion to rely on regulation 32(2)(a) to justify a direct award to the Reduced IDEEA Partnership. No admissions are made as to what the Defendant "would have" done had it considered the proposals of the Reduced IDEEA Partnership to involve a material change/substantial modification of the original Consortium Bid; the Defendant is put to strict proof of the same.

MICHAEL BOWSHER QC
LIGIA OSEPCIU
MONCKTON CHAMBERS
5 OCTOBER 2018

The Claimant believes that the facts stated in this Reply to Defence are true

I am duly authorised to sign this statement on behalf of the Claimant

Signed:

Steve Flanagan, Chief Executive Officer

Date: 5 OCTOBER 2018



10/10/2017